SUPREME COURT, U.S.

07-1-FEB 12 2007

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OSCAR B. SHIRANI,

Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent

and

EXELON CORPORATION,

Intervening Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DOLORES C. PINO
Counsel of Record
7200 Wilson Terrace
Morton Grove, IL 60053-1142
(847) 965-3354

QUESTION PRESENTED

Whether the 1992 Congressional amendments to the nuclear whistleblower protection statute, Section 210 of the Energy Reorganization Act of 1978, which established a new, "free-standing" evidentiary framework for nuclear whistleblower complaints of discrimination, prohibit the Secretary of Labor and federal Courts of Appeals from continuing to apply the *McDonnell Douglas/ Mt. Healthy* evidentiary standards in adjudicating such complaints, as to which the Courts of Appeals are now in conflict.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii-iv
Table of Authorities	v-vii
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1-2
Statement of the Case	3
Reasons for Granting the Petition	5-24

1. The Court of Appeals' Unpublished Decision Below, Following Its Own Authoritative Precedent Set By a 2005 Published Opinion, *Hasan v. U.S. Dep't of Labor*, is in Direct Conflict with the Published Decisions of Four Other Circuit Courts of Appeals Which Hold That the *McDonnell Douglas* Standards No Longer Apply to ERA Nuclear Whistleblower Claims Because Congress Created an Independent Evidentiary Framework for ERA claims in the 1992 Amendments 5

A. The Decision Below Presents a Conflict in the Circuits 5

B. This Conflict in the Circuits Interferes With the Uniform Administration of ERA Claims 10

2. The Court of Appeals Decision is Clearly Erroneous, Contradicting the Clear and Plain Language and Unequivocal Legislative History of the 1992 Congressional Amendments as to the Correct Burdens of Proof, and Making Other Serious Legal Errors 11

A. The 7th Circuit Decision Contradicts the Plain, Clear Statutory Language of the 1992 ERA Amendments 11

B. The Court of Appeals' and DOL's Misapplication of the *McDonnell Douglas* Evidentiary Framework to this ERA Case Likely Caused Other Serious Legal Errors 17-19

3. The Petition Involves a Question of National Importance 19

A. The Question is Recurring ... 19

B. Unfairness for a Large Number of People is Resulting From Discrepant Legal Rulings 21

C. A Nationally Binding Rule of Law is Now Needed to Clarify the Correct Evidentiary Standards for ERA Whistleblower Claims. 24

Conclusion 25

Separately Bound Appendix

7th Circuit Opinion 1-8

ARB Decision 9-32

ALJ Decision 33-91

Order Denying Rehearing 92

TABLE OF AUTHORITIES

Cases

Doyle v. *U.S. Sec. Labor*, 285 F.3d 243 (3rd Cir. 2002) 5, 6

English v. Gen. Elec. Co., 496 U.S. 72 (1990) 12

Gale v. Ocean Imaging, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. (ARB July 31, 2002)... 19

Hasan v. *U.S. Dep't of Labor*, 400 F.3d 1001 (7th Cir. 2005) 4, 5, 10, 13

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) ..... *passim*

Mt. Healthy v. *Doyle*, 429 U.S. 274 (1977) ..... *passim*

Muino v. Florida Power & Light Co., 2006-ERA-2, Rec. Order (ALJ April 13, 2006) 19

Sec. Agriculture v. *U.S.*, 347 U.S. 645 (1954)..... 20

Speegle v. Stone & Webster Constr., 2005-ERA-6, Rec. D & O (ALJ January 1, 2006) 19-20

Stone & Webster Engineering Corp. v. *Herman*, 115 F.3d 1568 (11th Cir. 1997) 6, 7-10, 13

Texas Dep't Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 13

Thompson v. *DOL*, 885 F.2d 551 (9th Cir. 1989) 20

Trimmer v. *U.S. Dep't of Labor*, 174 F.3d 1098 (10th Cir. 1999) 6-7

Williams v. Administrative Review Bd., 376 F.3d 471 (5th Cir. 2004) 5-6

Yule v. *Burns Interntl. Security*, 93-ERA-12, D & O of SOL (May 24, 1995)..... 20

Statutes

The Energy Reorganization Act ("ERA"), 42 U.S.C.A. § 5851 .... *passim*

The 1992 Amendments to the Energy Reorganization Act, Pub.L. 102-486, § 2902(d), adding par. (3), made effective by § 2902(i) to claims filed on or after October 24, 1992 .. .. *passim*

Other Legal Authority

H. Rep. No. 102-474(VIII) (1992), *reprinted in* 1992 U.S.C.C.A.N. 2297 22

138 CONG. REC. 32081-82 (1992) (statement of Rep. Miller) 14-15

138 CONG. REC. 32114 (1992) (statement of Rep. Williams) 15-16

138 CONG. REC. 32116-17 (1992) (statement of Rep. Ford) 16

OSHA "Whistleblower Investigations Manual", revised 8/22/03 20-21

Petitioner Oscar B. Shirani respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. App. 1-8. The decisions of the Secretary of Labor, by the Administrative Review Board and the Administrative Law Judge, are reproduced in the Appendix. ARB decision, App. 9-32, ALJ decision, App. 33-91.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 2006. A timely petition for rehearing was denied on November 13, 2006. App. 92. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The notifications required by R. 29.4 have been made.

STATUTORY PROVISIONS INVOLVED

The "Complaint, filing and notification" section of the nuclear whistleblower protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851(b), provides:

(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection

(a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

(C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

The 1992 Amendments to the Energy Reorganization Act, Pub.L. 102-486, § 2902(d), added this par. (3), and was made effective by § 2902(i) to claims filed on or after October 24, 1992.

STATEMENT OF THE CASE

This case presents a recurring question on an important matter relating to the proper evidentiary framework and burdens of proof in the nuclear whistleblower protection provisions of the ERA, 42 U.S.C. § 5851.

Petitioner Oscar B. Shirani is a nuclear safety auditor who brought a whistleblower lawsuit pursuant to 42 U.S.C. § 5851 against ComEd/Exelon, for being separated from his career there in relation to his protected safety activity.

The jurisdiction of the Court of Appeals was invoked as a petition for review of a final decision of the U.S. Department of Labor (DOL), Administrative Review Board (ARB), No. 03-ARB-100, dated September 30, 2005, which disposed of all claims, as permitted by F.R.A.P. 15 and the ERA, 42 U.S.C. § 5851(c)(1).

In 1992, Congress amended the ERA to provide an independent evidentiary framework for nuclear whistleblower claims brought pursuant to the ERA. Prior to these amendments, the DOL and the reviewing courts applied to ERA claims the evidentiary framework developed in the *McDonnell Douglas* caselaw for general employment discrimination cases.

However, in its administrative decisions on this case, the DOL applied the *McDonnell*

Douglas framework and its evidentiary standards to Mr. Shirani's ERA claim. ALJ decision, App. 74-75 (reciting employee's burden of proof as needing to prove that the protected activity was the "likely reason" for the adverse action and omitting the employer's burden of proof of "clear and convincing evidence" under the ERA), ARB decision at 8, App. 25-26 (repeating ALJ's application of Title VII "failure to hire" test and omitting the employer's burden of proof of "clear and convincing" evidence under the ERA).

The 7th Circuit issued a 2005 published opinion in *Hasan v. U. S. Dep't of Labor*, 400 F.3d 1001, 1004, (7th 2005), in which it specifically held that the *McDonnell Douglas* evidentiary framework applies to ERA claims. "The parties agree that the same standard for establishing a prima facie case of retaliation that is used in employment discrimination statutes such as Title VII is appropriate in retaliation cases brought under the Energy Reorganization Act, even though the procedure under that Act is administrative rather than judicial." *Hasan*, 400 F.3d at 1004.

The 7th Circuit decision below, also following the Circuit precedent in the *Hasan* opinion, explicitly applied the *McDonnell Douglas* framework in the last sentence on page three, App. 6, holding that Shirani had to prove that his termination was "based" on his protected activity, omitted any mention and application of

the employer's "clear and convincing burden of proof," and repeated the ARB's and ALJ's application of the "refusal to hire" version of the *McDonnell Douglas* test on page three, App. 5.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Unpublished Decision Below, Following Its Own Authoritative Precedent Set By a 2005 Published Opinion, *Hasan v. U.S. Dep't of Labor*, is in Direct Conflict with the Published Decisions of Four Other Circuit Courts of Appeals Which Hold That the *McDonnell Douglas* Standards No Longer Apply to ERA Nuclear Whistleblower Claims Because Congress Created an Independent Evidentiary Framework for ERA claims in the 1992 Amendments.

   A. The Decision Below Presents a Conflict in the Circuits.

In direct conflict with the 7th Circuit precedent in *Hasan* and the decision below, at least four other U.S. Courts of Appeals have reached this issue in published opinions and specifically held that the *McDonnell Douglas* framework no longer applies to ERA nuclear whistleblower claims because Congress provided an independent evidentiary framework for that statute in 1992. *See Doyle v. U.S. Sec. Labor*, 285 F.3d 243, 249-50 & n. 9 (3rd Cir. 2002), *Williams v. Administrative Review Bd.*, 376 F.3d

471, 476 and n.3 (5th Cir. 2004), *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999), and *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

In *Doyle*, 285 F.3d at 249-50, the Court of Appeals for the Third Circuit reviewed the new evidentiary framework, noting: "[t]he Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776, effective October 24, 1992, amended section 210 to incorporate a burden-shifting paradigm whereby the burden of persuasion falls first upon the complainant to demonstrate that retaliation for his protected activity was a 'contributing factor' in the unfavorable personnel decision."

In *Williams*, 376 F.3d at 476, the Court of Appeals for the Fifth Circuit reviewed the new evidentiary framework and wrote: "[i]n 1992, Congress inserted into the ERA an independent burden-shifting framework to be used in determining employer liability in claims brought under § 5851."

In *Trimmer*, 174 F.3d at 1101, the Court of Appeals for the Tenth Circuit wrote:

> [i]n 1992 Congress amended § 5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411

U.S. 792, 800-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

In footnote 4, the *Trimmer* court wrote:

> [t]he amendment to § 5851 became effective as to claims filed with the Secretary on or after October 24, 1992. *See* Energy Policy Act of 1992, Pub.L. No. 102-486, § 2902(i), 106 Stat. 2776, 3125. Accordingly, courts which have used the *McDonnell Douglas* burden-shifting framework to adjudicate ERA claims did so because the complaints were filed prior to that date. *See, e.g., Kahn v. Secretary of Labor*, 64 F.3d 271, 276 & n. 4, 277-78 (7th Cir. 1995); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 930, 934 (11th Cir. 1995); *see also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (rejecting *McDonnell Douglas* burden-shifting framework in favor of amended § 5851's burden-shifting requirements.)

In *Herman*, 115 F.3d at 1572 the Court of Appeals for the Eleventh Circuit wrote:

> [i]n 1992, Congress amended § 5851 to codify a particular framework regarding burdens of proof where no statutory guidance existed before. Energy Policy Act of 1992, P.L. 102-486, § 2902(d); *see also Mackowiak v. University Nuclear Systems,*

Inc., 735 F.2d 1159, 1164 (9th Cir. 1984) (upholding similar framework). Under the statutory framework, a complainant must first pass a gatekeeper test before an inquiry may commence. The Secretary may investigate only if the complainant succeeds in making a "prima facie showing" that retaliation for protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3)(A). Then the investigation must go forward, unless the employer "demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior." 42 U.S.C. § 5851(b)(3)(B).

Section 5851's reference to a "prima facie showing" has bred some confusion, chiefly because the phrase evokes the sprawling body of general employment discrimination law. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The Secretary of Labor and S & W have quarreled over how these cases and their innumerable progeny affect Section 5851's evidentiary burdens. But Section 5851 is

clear and supplies its own free-standing evidentiary framework. After a complainant has cleared the prima facie gatekeeper test – and assuming she has not been knocked out by a preemptory "clear and convincing" response from the employer – the Secretary is to investigate whether the complainant's behavior actually was "a contributing factor in the unfavorable personnel action." 42 U.S.C. § 5851(b)(3)(C). The burden to persuade the Secretary falls upon the complainant, and she must do so by a preponderance of the evidence. *Dysert v. Sec. of Labor*, 105 F.3d 607, 610 (11th Cir. 1997). If the complainant succeeds, the employer has a second chance to offer "clear and convincing evidence" that it would have done the same thing anyway, i.e., "in the absence of such behavior." § 5851(b)(3)(D).

For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves. "Recent accounts of whistleblower harassment at both NRC licensee . . . and [Department of Energy] nuclear facilities . . . suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry." H. Rep. No. 102-474(VIII), at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2282, 2297. "These

> reforms," the House Report continues, "are intended to address those remaining pockets of resistance." *Id.*

Therefore, the 7th Circuit's decisions in *Hasan* and the decision below on this question stand in direct conflict with the authoritative opinions of four other Courts of Appeals.

B. This Conflict in the Circuits Interferes With the Uniform Administration of ERA Claims.

This Circuit split should be seen as intolerable because it creates unfairness to litigants, frustrates the uniform administration of the ERA by the Secretary of Labor, and creates the needless confusion for multi-circuit nuclear employers of different ERA legal standards for different regions.

This 7th Circuit precedent, standing alone, has and will create unfairness to ERA litigants, by allowing the federal benefits of the ERA's particular burdens of proof in most circuits while denying them in the 7th Circuit's jurisdiction.

This conflict also "encourages non-acquiescence" by the DOL, by forcing the administrative adjudication staff to choose between the uniform administration of the ERA statutory scheme and obedience to the differing

ERA evidentiary burdens applied by the 7th Circuit and the other Courts of Appeals.

This conflict also has the potential to impose unjustified economic costs on the nuclear industry. Confusion as to the governing law most likely exists for multi-circuit nuclear corporations with these different evidentiary standards for ERA cases in different Circuits. It is also possible that nuclear employers in the 7th Circuit could obtain an unfair competitive advantage on ERA claims through the more lenient ERA evidentiary standards allowed by the 7th Circuit precedent.

2. The Court of Appeals Decision is Clearly Erroneous, Contradicting the Clear and Plain Language and Unequivocal Legislative History of the 1992 Congressional Amendments as to the Correct Burdens of Proof, and Making Other Serious Legal Errors.

A. The 7th Circuit Decision Contradicts the Plain, Clear Statutory Language of the 1992 ERA Amendments.

The nuclear whistleblower protection section of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, provides that employees of nuclear power plants and other regulated nuclear entities may bring complaints of discrimination for adverse personnel actions related to their bringing forth nuclear safety

concerns – the "protected activity." The ERA provides remedies for successful complainants of job reinstatement and compensatory damage awards, among other relief.

The important legislative intent behind this section of the ERA is to encourage workers at nuclear plants to come forward freely with safety concerns they encounter, and to protect their jobs when they do come forward. *English v. Gen. Elec. Co.*, 496 U.S. 72, 82 (1990).

Prior to October 1992, this statute contained no guidance on the applicable burdens of proof for such complaints, so the DOL and the federal courts reviewing decisions under this statute applied the *McDonnell Douglas* burden-shifting evidentiary framework used in general employment discrimination cases. However, around 1989, Congress began amending several of the important federal whistleblower protection statutes, including the ERA, to make it easier for employees to prevail in their whistleblower complaints than it had been using the *McDonnell Douglas* framework.

Effective October 24, 1992, Congress amended the ERA by adding explicit burdens of proof to the statutory language. These amendments lowered the level of contribution of the protected activity to the adverse job action – which the employee needs to prove by a preponderance of the evidence – from being a "substantial factor" under *McDonnell Douglas* to

only a "contributing factor." *See, e.g., Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997). Congress also changed the employer's *McDonnell Douglas* burden of production of only making a showing of legitimate business reason for the adverse personnel action to making it an actual burden of proof, and making it the highest civil law burden of proof, "by clear and convincing evidence." *Id*; *Texas Dep't Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (the employer's burden is not one of persuasion but is one of production of admissible evidence, only the burden of explaining clearly the nondiscriminatory reasons for its action).

The language of these amendments in the ERA statute is plain and clear, making any attempted defense of this legal error involving varying "statutory interpretations" very weak. The 7th Circuit made no such statutory interpretation arguments; the *Hasan* decision contains a conclusory sentence stating the *McDonnell Douglas* test applies to ERA claims with no analysis of the statutory language of 42 U.S.C. § 5851, and the unpublished panel decision in Mr. Shirani's case did not address this issue.

Further, the legislative history is unequivocal that in the 1992 ERA amendments, Congress intended to replace the burdens of proof of the *McDonnell Douglas/ Mt. Healthy* framework with a lower burden for the employee and a higher

burden for the employer in order to make it easier for nuclear whistleblowers to prevail in ERA claims for discrimination. *See* 138 CONG. REC. 32081-82 (1992) (statement of Rep. Miller):

> Title XXIX of the conference agreement creates a new paragraph (3) in section 210(b) of the Energy Reorganization Act of 1974. Paragraphs (3)(A) and (3)(B) impose a limitation on the investigative authority of the Secretary of Labor in whistleblower cases. If the complainant does not make a prima facie showing that protected activity contributed to the unfavorable personnel action alleged in the complaint, the Secretary must dismiss the complaint and cease the investigation. And if the employer demonstrates by clean [sic] and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior, the Secretary must cease the investigation. These limitations apply only to the Secretary's prosecution of the complaint. The complainant is free, as under current law, to pursue the case before the administrative law judge if the Secretary dismisses the complaint. At the administrative law judge hearing and in any subsequent appeal, the complainant's burden of proof will be governed by new section 210(b)(3) (c) and (d). Once the complainant makes a prima facie showing that protected activity contributed to the

> unfavorable personnel action alleged in the complaint, a violation is established unless the employer establishes by clean [sic] and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.
>
> The conferees intend to replace the burden of proof enunciated in *Mt. Healthy* v. *Doyle,* 429 U.S. 274 (1977), with this lower burden in order to facilitate relief for employees who have been retaliated against for exercising their rights under section 210.

See also 138 CONG. REC. 32114 (1992) (statement of Rep. Williams):

> A compromise was reached providing for the first time meaningful protection for whistleblowers in the nuclear industry. Obstacles have been removed that had discouraged employees from bringing to the attention of the public information about potential health and safety problems. These provisions will protect not only employees and the public but will also help build confidence in the industry.
>
> The whistleblower reforms include extending from 30 days to 180 days the time for filing a complaint. A new burden of proof is established that makes it more

> realistic for an employee to prevail in a case of retaliation.

See also 138 CONG. REC. 32116-17 (1992) (statement of Rep. Ford):

> The conferees intend to replace the complainant's burden of proof enunciated in *Mt. Healthy* v. *Doyle*, 429 U.S. 274 (1977), in order to facilitate relief for employees who have been retaliated against for exercising their rights under section 210.

Therefore, Congress clearly amended the ERA in 1992 by adding a "free-standing" evidentiary framework. While similar to the *McDonnell Douglas* framework, these amendments clearly contain different burdens of proof than those of *McDonnell Douglas*. The ERA evidentiary standards are lessened on the employee and heightened on the employer compared to those applied by the DOL and courts prior to the 1992 amendments.

Since 1992, the employee's burden of proof under the ERA has been to prove that the protected activity was only "a contributing factor" in the adverse personnel action, lessened from a "substantial factor", and the employer's evidentiary standard is no longer only the burden of production of showing a legitimate, non-discriminatory reason for the adverse action, but is an actual burden of proof, and is

the highest civil law burden of proof, that of "by clear and convincing evidence."

B. The Court of Appeals' and DOL's Misapplication of the *McDonnell Douglas* Evidentiary Framework to this ERA Case Likely Caused Other Serious Legal Errors.

- Serious Error in Eliminating a Significant Part of Petitioner's Case

The 7th Circuit and DOL decisions ignored the employer's refusal to grant Shirani's requests to return to the nuclear section from the financial area where he had transferred and from which he was terminated, despite that this unfavorable job action continued through the day he was terminated and ended within the limitations period.

- Serious Error in Knowledge Element:

The ALJ and ARB concluded that the "employer" as relevant to the question of employer knowledge was one person, Shirani's direct supervisor at the time of his termination, Ellen Dee Caya. The record actually shows that Ellen Dee Caya admitted in her testimony that she knew about Shirani's protected activity, that Shirani told her about an audit of GE he conducted that was not favorably received. Tr. 564-65.

But the ARB and ALJ decisions, as well as the 7th Circuit decision at p. 3, made the serious error of failing to recognize that this direct testimony of Caya stating she knew of Shirani's protected activity, his high profile GE audit that caused unfavorable views at ComEd, is sufficient to meet the knowledge prong of the prima facie case. This testimony is not contradicted anywhere in the record, and therefore, by definition, this testimony constitutes substantial evidence that the employer had knowledge of the Petitioner's protected activity.

- Serious Error in Evaluating Employer's Evidence of Legitimate, Non-discriminatory Reason for Adverse Actions

The employer's evidence in this case consists of alleging Mr. Shirani applied for a job for which he was not qualified during a reorganization, and he was then eliminated from the corporation. But that job application contains a signature which does not match Mr. Shirani's signature, and the dates on the job description and application do not match the testimony of the manager in charge. On review, the 7th Circuit did not apply the ERA's "clear and convincing" evidence burden of proof to this employer evidence, and instead seemed to apply only the *McDonnell Douglas* employer's burden of production.

- Serious Error in Evaluating the Evidence of Retaliatory Motive

The 7th Circuit and ARB decisions ignored the overwhelming amount of evidence in the record showing retaliatory motive and the interrelations among the group of decision makers who held and exercised personnel authority over Shirani.

3. The Petition Involves a Question of National Importance.

A. The Question is Recurring.

In addition to the DOL's incorrect application of the ERA law in Mr. Shirani's case in recent years, the same mistake was made in a case cited in the ARB opinion in Mr. Shirani's case, *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 9 (ARB July 31, 2002). Other cases in which the *McDonnell Douglas* standards were applied to ERA claims, in whole or in part, confusing or eliminating the evidentiary framework of the 1992 ERA amendments, are: *Muino v. Florida Power & Light Co.*, 2006-ERA-2, Rec. Order at 5-6 (ALJ April 13, 2006) (stating that the prima facie case includes that the protected activity was the likely reason for the adverse action and applying general Title VII employment discrimination law), and *Speegle v. Stone & Webster Constr.*, 2005-ERA-6, Rec. D & O at 29-30 (ALJ January 1,

2006) (applying Title VII burdens of proof despite reciting correct ERA burdens of proof).

Moreover, in the 1990's, the DOL issued decisions in which it did recognize and apply the 1992 ERA amendments to ERA claims. *See, e.g., Yule v. Burns Internt'l. Security*, 93-ERA-12, D & O of SOL at 4 and n. 4 (May 24, 1995) (recognizing and applying new ERA burden of proof on employer of "by clear and convincing evidence"). An administrative agency is either obligated to follow its own precedents or explain its departure from them, both of which the DOL failed to do in Mr. Shirani's case. *See, e.g., Thompson v. DOL*, 885 F.2d 551, 557 (9th Cir. 1989), *Sec. Agriculture v. U.S.*, 347 U.S. 645, 653 (1954).

ERA discrimination claims are arising from the 7th Circuit's jurisdiction in real numbers. In response to Petitioner's attorney's recent Freedom of Information requests asking for the numbers of ERA claims being filed, the Occupational Safety and Health Administration (OSHA) (where the administrative process for ERA claims begins) produced documentation that between one and several ERA whistleblower claims were filed by nuclear workers in Illinois and Wisconsin every year since 2000.

Also, the internal guidance manual used by OSHA staff to investigate ERA claims contains confusing recitation of the evidentiary standards. *See* OSHA's "Whistleblower

Investigations Manual", revised 8/22/03, available at www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf. In the beginning, general instructions for whistleblower investigations in this manual, the employer defense described is the *McDonnell Douglas* type of burden of production. "Field Investigation – Burden of Proof" at p. 3-2, 3-3. While later, in the specific section for ERA claims at p. 12-2, the ERA employee burden of proof of a "contributing factor' is recited, the manual does not clarify that the ERA burdens are distinct from the general ones used for other whistleblower statutes and must be applied without reference to those general burdens. Confusion for OSHA investigators thus could be caused by lack of specific enough instructions on ERA claims in this manual.

B. Unfairness for A Large Number of People is Resulting From Discrepant Legal Rulings

The 7th Circuit's and DOL's continuing, incorrect application of the *McDonnell Douglas* test to ERA claims, in direct violation of Congress' 14-year-old lessened burden of proof on employees and heightened burden of proof on employers, negatively affects the health, safety, and welfare of the people of Illinois and Wisconsin.

The people of Illinois bear the risk of living with the most nuclear power plants in the U.S.,

eleven operating in northern Illinois surrounding the Chicago metropolitan area. In addition, there are a dozen or so additional sites containing highly radioactive nuclear material, including decommissioned nuclear plants and various nuclear storage sites.

Congress first singled out nuclear employees for special protection from retaliation for raising safety concerns when it enacted the employee protection provision of the ERA in 1978, which was strengthened in the 1992 amendments. Congress wrote in the House Report for the 1992 amendments:

> The ability of nuclear industry employees to come forward to either their employers or to regulators with safety concerns without fear of harassment or retaliation is a key component of our system of assuring adequate protection of public health and safety from the inherent risks of nuclear power. Recent accounts of whistleblower harassment at both NRC licensee . . . and DOE nuclear facilities . . . suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry. These reforms are intended to address those remaining pockets of resistance.

H. Rep. No. 102-474(VIII), at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2297.

Nuclear plant safety problems are continuing to occur within the 7th Circuit's jurisdiction:

- Between 1996 – 2000, over six million gallons of radioactive, tritiated water leaked from ComEd/Exelon's Braidwood nuclear power plant in Illinois. See press release of Illinois Attorney General, http://www.ag.state.il.us/pressroom/2006_03/20060316.html.

- The NRC's current nuclear reactor oversight process is individualized for each nuclear power plant, and measures safety performance by a series of specific indicators. However, on this safety performance index, the Exelon nuclear power plants in Illinois remain sub-par. See http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/actionmatrix_summary.html, showing that Illinois nuclear plants Braidwood 1 and 2, Byron 2, Dresden 2, and Quad Cities 1 are currently in the "Regulatory Response Column" due to safety performance findings requiring corrective action.

- In Wisconsin, all three of the nuclear power plants in the state, the Kewaunee and Point Beach 1 and 2, are currently in the NRC's corrective actions columns on this safety performance index.

For these reasons, the people of Illinois and Wisconsin deserve at minimum that the jobs of nuclear employees are protected under the ERA to the level Congress set for them in 1992. This

will help encourage employees to come forward to report nuclear safety problems, and to know that if they suffer retaliation, they will have their clams adjudicated in the more employee-protective form provided by Congress.

C. A Nationally Binding Rule of Law is Now Needed to Clarify the Correct Evidentiary Standards for ERA Whistleblower Claims.

The 7th Circuit's and DOL's continuing application of the *McDonnell Douglas* evidentiary framework to ERA claims is directly contrary to the ERA's plain, clear statutory language, its unequivocal legislative history, and the explicit policy of Congress.

This Court should now clarify the correct burdens of proof and evidentiary framework for the ERA. Also needed are answers to whether and to what extent the Secretary of Labor and Courts of Appeals may continue to apply other relevant aspects of the *McDonnell Douglas* caselaw to ERA whistleblower claims, that would not nullify the burdens of proof and statutory elements of the 1992 ERA amendments.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted by,

Dolores C. Pino, Attorney for
Petitioner Oscar B. Shirani

February 12, 2007